STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

JOSEPH WILLIAM MILLER
Defendant-Appellee
_____/

MICHIGAN ATTORNEY GENERAL
LEELANAU COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellee
_____

Supreme Court No. 149502

Court of Appeals No. 314375

Lower Court No. 12-1777-FH

DEFENDANT-APPELLEE'S

BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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I. IS MCL 257.625(9)(C) A SENTENCING ENHANCEMENT, ENHANCING MISDEMEANOR OWI TO FELONY OWI; OF WHICH THE PRIOR CONVICTIONS ARE NOT AN ELEMENT?

Court of Appeals made no answer.

Plantiff-Appellant answers, “Yes”.

Defendant-Appellee answers, "Yes".

II. DOES DOUBLE JEOPARDY BAR CONVICTING AND PUNISHING MR. MILLER FOR BOTH OWI CAUSING SERIOUS INJURY UNDER MCL 257.625(5) AND ITS NECESSARY LESSER INCLUDED OFFENSE OF OWI UNDER MCL 257.625(1)?

Court of Appeals answers, "Yes".

Plantiff-Appellant answers, “No”.

Defendant-Appellee answers, "Yes".

STATEMENT OF FACTS

Joseph William Miller was convicted of Operating While Intoxicated (OWI) under MCL 257.625(1) and sentenced as a third offender under MCL 257.625 (9) (Count 1)[1] and Operating While Intoxicated Causing Serious Injury (OWI causing injury) under MCL 257.625(5) (Count 2),[2] following a jury trial before Leelanau Circuit Court Judge Thomas G. Power on October 17, 2012. The prosecutor's theory was that on June 28, 2012, during an argument with his intoxicated girlfriend, while she was driving, Mr. Miller (who was over the legal BAC limit for driving) grabbed her car's steering wheel and caused the car to strike a tree, resulting in Ms. Cuellar sustaining a concussion and broken collar bone. (18a – 32a).

On direct appeal, the Michigan Court of Appeals vacated Mr. Miller's OWI conviction and remanded for amendment of the judgment of sentence, "because Defendant's two convictions violate[d] double jeopardy[.]" *People v Miller*, unpublished opinion per curium of the Michigan Court of Appeals, issued March 11, 2014, (Docket No. 314375) (9a-13a). This Court granted the prosecutor's application for leave to appeal. *People v Miller*, 497 Mich 881 (2014) (15a).

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1 MCL 257.625(1)(b); MCL 257.625(9)(c).

2 MCL 257.625(1)(b); MCL 257.625(5).

SUMMARY OF ARGUMENT

This Court should find that convictions for both Operating While Intoxicated (MCL 257.625(1)), and Operating While Intoxicated Causing Serious Injury (MCL 257.625(5)) violate double jeopardy, because OWI is a necessarily included lesser offense of OWI causing injury.

People v Ream, 481 Mich 223 (2008) was wrongly decided. Consistent with *People v Wilder*, 485 Mich 35 (2010) and *United States v Dixon*, 509 US 688, 700 (1993) where alternative theories of conviction are possible, the elements must be viewed under the prosecutor's charging theory. Because the prosecutor pursued only a single theory of conviction here (that Mr. Miller drove a vehicle, while over the legal BAC level, causing an injury when the vehicle hit the tree) OWI does not contain any elements distinct from OWI causing serious injury; the latter simply imposes the additional element of causing serious injury. Thus, under *Wilder* and *Dixon*, OWI is a necessarily lesser included offense.

If this Court does not find that *Ream* was wrongly decided, it should nevertheless find it inapplicable to this case, because *Ream* involved a predicate offense contained in a wholly unrelated statute, whereas this case involves convictions under the same statute. Instead, this Court should find that OWI and OWI causing injury are degrees of the same offenses (as this Court addressed in *Wilder*), and on that basis apply a *Wilder* analysis to determine that OWI is a necessarily lesser included offense of OWI causing serious injury here.

Finally, this Court should hold that subsection 3 (driving while visibly impaired) and subsection 8 (driving with any amount of a schedule 1 controlled substance), simply provide alternative ways of proving intoxication, but do not eliminate or replace that element, such that there can be no alternate theory under which the element of intoxication is not required. Thus, this Court should find that dual convictions in this case are prohibited by double jeopardy.

ARGUMENT

I. MCL 257.625(9)(C) IS A SENTENCING ENHANCEMENT, ENHANCING MISDEMEANOR OWI TO FELONY OWI. THE PRIOR CONVICTIONS ARE NOT AN ELEMENT OF A CONVICTION AND SENTENCE FOR OWI 3RD.

Standard of Review

This Court reviews statutory construction and constitutional law questions *de novo*. *People v Babcock*, 469 Mich 247, 253 (2003); *People v Smith*, 478 Mich 292, 298 (2007)

Discussion

Mr. Miller was convicted in Count 1 of OWI for operating a vehicle with a blood alcohol content ("BAC") over the legal limit in violation of MCL 257.625(1). The parties agree the felony sentence he received for that offense pursuant MCL 257.625(9)(c) (OWI 3rd offense) was pursuant to a sentencing enhancement and not a separate crime. By the statute's plain language, MCL 257.625(9) does not apply to increase punishment until after a defendant has already been "convicted" under either Subsection (1) or Subseciton (8). *See People v Weatherholt*, 214 Mich App 507 (1995), citing *People v Eason*, 435 Mich 228 (1990). The United States Supreme Court has held that a sentencing enhancement is not an element of the underlying offense: "An indictment must set forth each element of the crime that it charges. But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." *Almendarez-Torres v United States*, 523 US 224, 228 (1998)(internal citation omitted)[3]. The "sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes." *Id.* at 247.

[3] The *Almenderez-Torres* Court reasoned that the legislature's inclusion of the recidivist sentence enhancement within the statute (preventing a deported alien from returning to the United States) rather than setting it out in a separate statute further indicated that it was a sentence enhancement.

II. DOUBLE JEOPARDY BARS CONVICTING AND PUNISHING MR. MILLER FOR BOTH OWI CAUSING SERIOUS INJURY UNDER MCL 257.625(5) AND ITS NECESSARY LESSER INCLUDED OFFENSE OF OWI UNDER MCL 257.625(1).

Standard of Review

This Court reviews issues of constitutional law *de novo*. *Smith, supra* at 298 .

Discussion

The United States and the Michigan Constitutions state that no person may be put in jeopardy twice for the same offense. US Const, Am V; Mich Const 1963, art 1, § 15. Double jeopardy is composed of a successive prosecution strand and a multiple punishment strand. S*ee North Carolina v Pearce*, 395 US 711 (1969); *Smith*, *supra* at 299. Mr. Miller's case involves multiple punishments as he was convicted twice for the same act.

This Court applies the "same-elements" test of *Blockburger v United States,* 284 US 299 (1932), to determine whether double jeopardy permits multiple convictions for the same act. *See People v Franklin*, 298 Mich App 539, 546 (2012). Under that test, the court compares the elements of the two offenses. If each offense includes an element that the other does not, they are not the "same offense" and double jeopardy permits multiple punishment. *Id.* But if only one of the offenses has a unique element and all other elements are shared by both offenses, conviction and punishment for both violates double jeopardy. *Id.; Blockburger, supra.*

Because OWI is a necessarily lesser included offense of OWI causing serious injury and a finding of guilt on the greater charge was necessarily a finding of guilt on each and every element of OWI as charged in this case, double jeopardy was violated.

A. Because OWI is a necessarily lesser included offense of OWI causing injury as charged in this case, and because a guilty finding on OWI causing serious injury necessarily required a guilty finding on all elements of the simple OWI charge, Double Jeopardy was violated.

The United States Supreme Court has repeatedly and consistently held that double jeopardy bars convicting and punishing a defendant for any necessary lesser included offense when he has been convicted and punished for the greater offense. *Brown v Ohio*, 432 US 161 (1977); *Illinois v Vitale*, 447 US 410, 420 (1980); *United States v Dixon*, 509 US 688 (1993); *Rutledge v United States*, 517 US 292 (1996). The Court has similarly held that, regardless of how *Blockburger* applies, where a statutory offense expressly incorporates another statutory offense within its elements without specifying the latter's elements, the two are the same offense for double jeopardy purposes. *Harris v Oklahoma*, 433 US 682 (1977); *Whalen v United States*, 445 US 684, 694 (1980); *Grady v Corbin*, 495 US 508, 528 (1990) (Scalia, J., dissenting), overruled by *Dixon, supra*.

The two counts in this case meet both the above definitions. OWI causing serious injury under MCL 257.625(5) specifically incorporates violations of MCL 257.625(1) or (8) as alternate elements with the additional element requiring proof that the defendant's driving caused serious injury. Subsection (5) does not specifically lay out the individual elements set forth in Subsection (1). Thus, as in *Harris v Oklahoma,* the underlying substantive criminal offense of OWI is "a species of lesser-included offense" of OWI causing serious injury. *Vitale*, *supra* at 420, *accord Whalen, supra, and Dixon, supra* at 698.

Moreover, under Michigan law, Mr. Miller was charged and convicted of OWI in Count 1 (and elevated to a felony because of his two prior convictions) is a necessarily lesser included offense of OWI causing serious injury charge of Count 2. In *People v Wilder*, 485 Mich 35 (2010) this Court set forth the test for determining whether a crime is a necessarily lesser

included offense of another crime set forth in the same statute, and expressly disagreed with *Ream*'s approach of considering all possible alternative elements:

> The Court of Appeals opined that third-degree home invasion cannot be a necessarily included lesser offense of first-degree home invasion because one or more of the possible alternative elements of third-degree home invasion are distinct from the elements of first-degree home invasion. In doing so, it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue. The Court reasoned that if there could be any instance in which the underlying misdemeanor is not subsumed within the predicate felony, then the entire crime is a cognate offense. We disagree with this rationale.
>
> We conclude that a more narrowly focused evaluation of the statutory elements at issue is necessary when dealing with degreed offenses that can be committed by alternative methods. Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense.

Id. At 44-45.

Applying *Wilder,* the OWI charge of Count 1 in this case clearly is a necessarily lesser included offense of the OWI causing serious injury charge of Count 2. As charged, Count 1 required proof that Mr. Miller operated a motor vehicle while over the legal BAC level, contrary to MCL 257.625(1). As charged, Count II required proof that in operating a vehicle with an unlawful BAC level (in violation of Subsection (1)) Mr. Miller caused serious bodily injury. Trial 246-250. All of the elements of Count 1 are completely subsumed within Count 2 and Count 1 contains no element that Count 2 does not. As was the case in *Wilder, supra*, the fact that the prosecutor could have secured a conviction under an alternate theory (visible impairment or the presence of any amount of a controlled substance), does not change the fact that in this

case OWI is a necessarily included lesser offense of OWI causing injury, where the prosecutor did not apply either of those alternate theories to this case.

Convicting and punishing Mr. Miller for both the great and necessary lesser included offense therefore violates double jeopardy.

B. *People v Ream* does not dictate a different result.

In *People v Ream*, 481 Mich 223 (2008) this Court held that in comparing two charges, *Blockburger* requires an examination of *all possible* statutory and common law alternative means of committing the two offenses to determine if one "offense" requires proof that the other does not. Under *Ream*, if there is any possible hypothetical scenario under which a person *could* be found guilty of one offense without also being found guilty of the other, double jeopardy is not violated. This is so even if the alternatives considered were not charged in the case at hand.

Mr. Miller contends that *Ream* - the primary basis for the prosecution's position - is not controlling. *Ream* is distinguishable from the two provisions at issue here, which are set forth in the same statute targeting the same sets and subsets of offenses and penalties. Moreover, *Ream* was wrongly decided as it misinterpreted and misapplied well-established precedent from the United States Supreme Court.

1. *People v Ream* is distinguishable.

Although Mr. Miller disagrees with the test set forth in *Ream*, that case is distinguishable on its facts, and therefore is not applicable to the instant case. *Ream* involved the question of whether a defendant's multiple convictions of first degree criminal sexual conduct and first degree felony murder (utilizing defendant's acts establishing the 1st degree CSC) violated double

jeopardy. Consequently, this Court evaluated whether double jeopardy prohibited punishment under two wholly unrelated statutes – not violations contained within the same statute. Here, Mr. Miller was convicted under two different subsections of the same statute, making his case more similar to the degreed offenses (and necessarily included lesser offense) contained in *Wilder*, *supra.* The OWI statute establishes the crime of OWI and then applies increasing punishments with the addition of aggravating factors, such as multiple prior offenses, causing serious injury, or causing death, and its structure is an indication that the legislature did not intend multiple punishments.[4] As this Court held in *Wilder,* under the prosecutor's theory of this case, OWI is a necessarily lesser included offense of OWI causing injury, and thus double jeopardy prohibits multiple convictions and punishments.

2. ***People v Ream*** **was wrongly decided**

In holding that all possible alternatives of the two offenses must be considered for double jeopardy purposes, this Court in *Ream* reasoned that *United States v Dixon*, *supra*, had overruled prior U.S. Supreme Court precedent and commanded such approach. Mr. Miller respectfully submits that *Ream* misinterpreted *Dixon's* holding. Furthermore, the very result reached in *Dixon* itself belies the rule articulated in *Ream.*

In *Dixon,* the United States Supreme Court reversed previous recent holdings of that Court which had established a "new, additional double jeopardy test" beyond what *Blockburger*

[4] Where the Legislature divides an offense into formal degrees or sets up an offense in a single statute with the punishment increased based on various aggravating factors, resorting to *Blockburger* is not even necessary to determine legislative intent. *See* Justice Corrigan's dissent in *People v Nyx*, 479 Mich 112, 154–179 (2007); and her concurrence in *Wilder*, *supra* at 48. *See also Apprendi v New Jersey*, 530 US 466, 503-506 (2000)(discussion that statutory schemes that add aggravating facts to increase the punishment are really adding aggravating elements and essentially creating lesser included offenses).

prescribed. Under that approach, even if each offense at issue required proof that the other does not, a subsequent prosecution of one of the offenses violated double jeopardy "if, to establish an essential element of an offense charged in that prosecution the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Dixon, supra* at 703-704, *quoting Grady v Corbin*, 495 US 508 (1990). The *Dixon* Court rejected that "same conduct" test as lacking a constitutional basis, and stressed that the double jeopardy analysis is confined to the *Blockburger* same elements test.

But the test rejected in *Dixon* was simply one that allowed an examination of the entire criminal transaction to bar dual or successive prosecutions for both necessary lesser included offenses as well as cognate offenses based on the same conduct. *Grady, supra; see also People v Cornell*, 466 Mich 335 (2002). The result is that under *Dixon*, charged necessary lesser included offenses can constitute the "same offense" for double jeopardy, and punishment for two crimes each of which as charged have an element unique to itself, is still permitted. Contrary to this Court's reading of *Dixon*, the United States Supreme Court did not narrow *Blockburger* so much that any uncharged alternative must be considered. Because double jeopardy bars dual punishment for the same "offense" the actual crimes charged and convicted (rather than uncharged hypothetical alternatives) must be examined. The approached taken by *Dixon* toward the offenses before it, as well as its endorsement of its previous cases holding otherwise, establish that.

In *Dixon* itself, the Court examined two cases, looking (as this Court did in *People v Wilder, supra*,) to the prosecutor's theory in establishing the government's case. Defendant Dixon was released on bond while awaiting trial for second degree murder, with a release order forbidding him from committing any crimes. While on bond, Dixon was indicted for possession

of cocaine with intent to distribute. The lower court found Dixon in criminal contempt of the release order on the prosecutor's theory that Dixon had possessed drugs with the intent to distribute them a crime under the law in the District of Columbia. The Supreme Court held that under *Blockburger, supra*, the indictment on the cocaine charge had to be dismissed because it was for the "same offense" as the contempt charge. The Court reasoned that the trial court's pretrial release order had "incorporated the entire governing criminal code in the same manner as the Harris felony-murder statute incorporated the several enumerated felonies". *Id.* at 698. Despite that a contempt violation could be established based on conduct and theories (elements) that were not covered by the criminal code, and despite that violations of the criminal code did not contain the element of violating a court order, the Court found a double jeopardy violation based on the theory advanced by the government in that case. *Id.* On the other hand, the Supreme Court held in that same case that defendant Foster could be punished for contempt and certain underlying offenses, where under the theory advanced by the prosecutor the elements were distinct (for instance, the contempt violation required knowledge of an existing protection order where assault with intent to kill did not, and assault with intent to kill required the intent to kill, but the contempt violation did not).

This Court lost sight of the fact that *Dixon* reached a result that would be directly contrary to the test proposed by *Ream.* Indeed, in his dissent in *Dixon*, Justice Rehnquist criticized Justice Scalia's analysis for his failure to apply the very test this Court developed in *Ream:* arguing that the *Blockburger* test should focus "on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue." *Dixon, supra* at 716-717.

Further lost in *Ream's* analysis is *Dixon*'s endorsement of previous decisions holding

exactly opposite to *Ream's* ultimate conclusion that conviction and punishment for both felony murder and the underlying predicate felony does not violate Double Jeopardy because uncharged alternatives exist in each offense that do not exist in the other. Compare *Ream, supra* at 236, 241-242, *with Dixon, supra* at 697-698, (endorsing *Harris v Oklahoma, supra, Illinois v Vitale, supra,* and *Whalen v United States, supra,* for the rule that felony murder and the predicate felony are the same "offense" under *Blockburger* even though each contain hypothetical elements the other does not).

As argued more fully by the Criminal Defense Attorneys of Michigan in its amicus brief in this case, U.S. Supreme Court precedents that are directly contrary to *Ream's* "all possible elements" in favor of an as-charged view of *Blockburger* remain good law. *Harris, supra* at 682; *Whalen, supra* at 684; *Payne v Virginia,* 468 US 1062 (1984) (*per curiam*); *Vitale, supra* at 410. *Dixon* did not purport to overrule these cases, and the U.S. Supreme Court still cites to these precedents as good law. See *Rutledge v United States*, 517 US 292, 297 (1996). Even where this Court believes that *Dixon* implicitly overruled or otherwise undermined the prior precedents, it is bound to follow them unless and until the U.S. Supreme Court specifically overrules them. *See Agostini v Felton,* 521 US 203, 237 (1997). This issue is more thoroughly discussed in CDAM's amicus brief, and Mr. Miller adopts those arguments and incorporates them herein.

Even if the prosecutor could theoretically prove visibly impaired driving (subsection 3) or any amount of a schedule 1 controlled substance in a driver's body (subsection 8), without proving intoxication, that is no different than the possibility of contempt on alternate theories in *Dixon, supra.* As was the case there, double jeopardy will not allow convictions under subsections 1 and 5 in this case, because the convictions on both rely on the exact same prosecutorial theory.

MCL 257.625(1) is simply a necessarily lesser included offense of MCL 257.625(5), because as charged – under the prosecutor's theory of the case - both subsections indisputably contain the element of intoxication, with subsection 5 imposing the single additional element of resulting bodily injury.

C. Contrary to the prosecutor's assertion, subsections 1, 3, and 8, of MCL 257.625 all share the element of intoxication; Therefore OWI and OWI causing serious injury are the same offense under *Blockburger* because each does not contain an element that the other does not.

The prosecutor concedes that MCL 257.625(1) contains the element of intoxication. But, the prosecutor argues that multiple punishments under subsections 1 and 5 are not barred by double jeopardy because one can violate subsection 5 by operating while visibly impaired (subsection 3), or by operating with any amount of a specified controlled substance in one's body (subsection 8), even if that amount does not lead to intoxication.

Therefore, at issue is whether a conviction under MCL 257.625(5) can be secured without proof of the element of intoxication, utilizing subsections 3 or 8, such that double jeopardy is not offended by punishments for violating both subsections 1 and 5.

Subsection 5 of MCL 257.625 provides:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

The argument of the prosecutor does not comport with the prior holdings of this Court (as set forth in subsections A1, A2, and A3 of this issue), recognizing that subsections 3 and 8 are

simply different ways of defining and requiring proof of the shared element of intoxication. Because MCL 257.625(3) and MCL 257.625(8) both contain the element of intoxication, the prosecutor's argument must fail.

1. "Visible impairment" under MCL 257.625(3) is simply a way of showing a "degree of intoxication that the prosecutor must prove".

The prosecutor asserts that in order to secure a conviction under subsection 3, the government must only prove visible impairment, not intoxication. This is incorrect: the prosecutor may use visible impairment to meet his burden of proving intoxication; he is not excused from proving that element.

MCL 257.625(3) prohibits a person from "Operat[ing] a vehicle . . . when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired." *Id.*

In *People v Lambert*, 395 Mich 296 (1975), this Court clarified that in order to show that a driver was visibly impaired under the OWI statute, the prosecutor had to prove a "degree of intoxication." *Id.* at 305. There, the trial judge sought guidance from this Court regarding how to instruct the jury as to the distinction between the offense of driving under the influence of intoxicating liquor, and the offense of driving while the ability to operate a vehicle is visibly impaired due to the consumption of intoxicating liquor. *Id.* at 304. This Court supplied the distinction, clarifying that both subsections required proof of some degree of intoxication, with visible impairment being one way of establishing proof on that element:

> After reading to the jury the pertinent portions of the statute under which defendant is charged, the judge may give the following instruction which we find to express legislative intent:

> 'The distinction between the crime of driving under the influence of intoxicating liquor and the lesser included offense of driving while ability is visibly impaired is the degree of intoxication which the people must prove.
>
> 'To prove driving under the influence of intoxicating liquor, the people must prove that defendant's ability to drive was substantially and materially affected by consumption of intoxicating liquor.
> 'To prove driving while ability is visibly impaired, the people must prove that defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person.' Emphasis added.

Id. at 303-05.

Because this Court has held that the government must prove a "degree of intoxication" to secure a conviction for driving while visibly impaired (essentially subsection 3), the prosecutor's argument that MCL 757.625(3) does not contain the element of intoxication must fail.

2. One cannot be convicted of violating MCL 257.625(8), where the controlled substance that the driver ingested is not one that causes "hallucinogenic or euphoric effects", in other words: intoxication.

The prosecutor asserts that the "any amount" language in MCL 257.625(8) establishes that intoxication is not required for a conviction and punishment under subsection 8. However, this Court has examined subsection 8, holding that the government had not met its burden of proof where the substance in the driver's body was not one widely accepted as having "hallucogenic or euphoric effects" on the user.

MCL 257.625(8) prohibits a person from "Operat[ing] . . . a vehicle . . . if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code,

1978 PA 368, MCL 333.7214." *Id.*

In *People v Feezel*, 486 Mich 184 (2010), this Court held that the presence of 11-carboxy-THC in a defendant's body (indicating that a defendant had previously used marijuana), could not support conviction for the violation of subsection 8, because it was not classified as a schedule 1 controlled substance and there was no proof that the presence of THC in the body would have a pharmacological effect leading to impairment. *Id.* at 208. This Court opined that while the substance may be related in some way to marijuana (a schedule 1 controlled substance), 11-carboxy-THC was not the type of substance the legislature intended to include in the subsection, because it did not have the same "hallucinogenic or euphoric effects" on a person as other drugs that were categorized under Schedule 1 – the forbidden schedule of drugs. *Id.* This Court held that its previous holding that 11-carboxy-THC was included in schedule 1 substances was erroneous, because it did not comport with the legislature's intent of preventing driving by persons who were under the hallucogenic or euphoric effects of marijuana (and other schedule 1 substances):

> Derror was wrongly decided. . . . When MCL 333.7212 is interpreted in the context of the statutory scheme, it does not appear that the Legislature intended for 11–carboxy–THC to be classified as a schedule 1 controlled substance.
>
> To begin with, our Legislature has declared that the provisions of the Public Health Code are "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1). Notably, while Michigan's definition of marijuana is virtually identical to the relevant portions of the federal definition,11 no federal court has held that 11–carboxy–THC is a controlled substance. Moreover, federal courts have stated that "the purpose of banning marijuana was to ban the euphoric effects produced by THC." . . . An expert in this case, however, agreed that 11–carboxy–THC has no known pharmacological effect. *See, also, Derror*, 475 Mich. at 321, 715 N.W.2d 822, indicating that the experts in that case agreed that 11–carboxy–THC " 'itself has no pharmacological effect on the body

> and its level in the blood correlates poorly, if at all, to an individual's level of THC-related impairment.' " Internal citations omitted.

Id. at 207-209.

The legislature could have simply left the "any amount" language of subsection 8 to stand alone; it did not. The legislature could have specified "any amount" of "*any* substance"; it did not. The legislature carefully crafted subsection 8 to apply only to schedule 1 controlled substances. This was not accidental. A driver cannot be convicted for driving after ingesting aspirin, because it is not included in the prohibited schedule of substances – because it does not have the same hallucogenic and intoxicating effects on the user as drugs included in that classification. On the other hand, a driver can be convicted of driving with "any amount" of heroin in his body, because it is classified as a schedule 1 controlled substance due to the hallucogenic and intoxicating effects that it is known to have on the body.

3. The Legislative intent of MCL 257.625 is to prevent driving by intoxicated persons or persons under the influence of intoxicants.

In *People v Wood*, 450 Mich 399 (1995), this Court defined the "operating" element of the OWI statute. In doing so, this Court also addressed the intoxication element. Examining the OWI statute as a whole in light of the "danger the legislature seeks to prevent" in setting forth the definition, this Court stated: "We conclude that 'operating' should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property." *Id.* at 404. This Court recently looked to the motor vehicle code in *Koon, infra,* to define "under the influence", holding that a driver may have marihuana in their system without being legally "under the influence" of marihuana, if the marihuana does not have an effect on the driver. *People v Koon*,

494 Mich 1, 6 n 4 (2013) [5].

In *People v Lardie*, 452 Mich 231, 259-60 (1996)[6] this Court examined MCL 257.625(4) (identical to MCL 257.625(5) except that the result is causing death, rather than injury), and stated "The statute is designed to deter motorists from deciding to drive **after they have become intoxicated**. Therefore, the culpable act that the Legislature wishes to prevent is the one in which a person **becomes intoxicated** and then decides to drive." Emphasis added. *Id.* at 245. This Court went on to set forth the elements of MCL 257.625(4):

> . . . (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death.51 Cf. CJI2d 16.12 (Involuntary Manslaughter with Motor Vehicle), quoted in n. 28.

Later, when this Court overruled *Lardie*, *supra*, it still left the intoxication element in place: "Accordingly, it is the defendant's operation of the motor vehicle that must cause the victim's death, not the defendant's 'intoxication'. While **a defendant's status as "intoxicated" is certainly an element of the offense of OUIL causing death**, it is not a component of the causation element of the offense." *Schaefer*, *supra,* 473 Mich 418 at 431 (emphasis added).

The prior holdings of this Court demonstrate that this Court has already decided that subsections 3 and 8 share the element of intoxication with subsection 1. While under the statute, intoxication may be shown in different ways: (the amount of alcohol per unit of blood (subsection 1), the degree to which intoxication has visibly impaired one's driving (subsection

[5] "Significantly, "under the influence" is a term of art used in other provisions of the Michigan Vehicle Code. *See, e.g.*, MCL 257.625(1)(a) (stating that a person is "operating while intoxicated" if he or she is "under the influence of ... a controlled substance ..."). *See also People v. Lambert*, 395 Mich. 296, 305 (1975) (concluding that an acceptable jury instruction for "driving under the influence of intoxicating liquor" included requiring proof that the person's ability to drive was "substantially and materially affected"); Black's Law Dictionary (9th ed.), p. 1665 (defining "under the influence" as "deprived of clearness of mind and self-control because of drugs or alcohol")." *Koon*, *supra*, at 7.

[6] Overruled in ways not relevant to this argument by *People v Schaefer*, 473 Mich 418 (2005).

3), or the presence of a substance in one's body, which is widely recognized as causing intoxication (hallucogenic or euphoric effects) (subsection 8)), the element is still present in all three subsections. Therefore, subsection 1 is always a lesser included offense of subsection 5, because a conviction under subsection 5 requires intoxication, under all circumstances.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

Defendant-Appellant asks this Honorable Court to uphold the Court of Appeals opinion and order vacating his conviction for Operating While Intoxicated.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Malaika D. Ramsey-Heath
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Date: February 4, 2015